IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

(A) In its brief in opposition, the school district urges that Mrs. Givhan's First Amendment rights "were meticulously respected" and that her employment was terminated because she failed or refused to cooperate with the principal and tried to run the school. Opp. 5, 7, 8, 10. This factual contention, as we show below, was rejected by both lower courts.

To support its avowed reasons for terminating Mrs. Givhan's employment, the school district relies heavily on the testimony of the principal. See, *e.g.*, quotations at Opp. 10, 18. The district court did not credit the principal's testimony, saying

> "The court, as finder of fact, after hearing all the testimony and reviewing the exhibits introduced at the trial, has concluded that the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach." Pet. App. 35.

On appeal, the school district urged that this "conclusion is not supported by the evidence." Appellants' Brief in the Fifth Circuit, pp. 34-35. In support of its contention, the school district quoted and paraphrased the same testimony of the principal that it now relies on in opposition. (Compare Appellants' Brief in the Fifth Circuit pp. 34-37 with Opp. pp. 7-11, 18.) The court of appeals ruled:

> "It is hard to conceive of issues that usually involve more credibility and other evaluative choices than what motivated someone and what the person would have done absent that motivation. The district court found that Leach [the principal] and the Board were motivated primarily by Givhan's 'demands in deciding not to rehire her.' That finding is not clearly erroneous." Pet. App. 11.

In as much as respondents' factual contentions have been twice rejected by the courts below, they do not provide an appropriate basis for denying the writ in this case.

(B) After characterizing Mrs. Givhan's conduct and statements in a manner entirely favorable to it (Opp. 5), the school district also urges that Mrs. Givhan's discussion with the principal concerning work assignments for black NYC workers, the need for assigning black persons to take tickets in the cafeteria, and the administration of a six week test "is fairly akin to 'falsely shouting fire in a theater.'" Opp. 5-6. If respondent intends to suggest that Mrs. Givhan's First Amendment interests as a citizen are outweighed by the school district's interests "in promoting the efficiency of the public services it performs through its employees," *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), then the argument is directed to an issue that this case does not present.

The court below held that expressions by a citizen or public employee to a public official are per se unprotected by the First Amendment (Pet. App. 13, 19), and in light of that holding it concluded that there was no occasion for balancing Mrs. Givhan's First Amendment interests as a citizen against the allegedly disruptive effects of her speech. Pet. App. 13 & n. 13. Accordingly, this Court is not presented with a balancing issue, but rather with the threshhold question whether a public employee's expressions to a public official ever implicate a First Amendment interest.

II

In the petition, Mrs. Givhan discussed opinions from four courts of appeals which demonstrate that *Pickering's* balancing test is the standard by which a court must determine whether a public employee's communication to his employer is protected by the First Amendment. The school district denies that there is a conflict among the circuits. Opp. 11. Its own brief, however, reaffirms the existence of the conflict. The school district states that two of the opinions cited by petitioner, "*Jannetta* and *Roseman*, *supra*, reach different results in the application of *Pickering* . . . ." Opp. 15. In contrast to *Jannetta* and *Roseman*, the court below expressly refrained from applying *Pickering* because, in its view, communications by a public employee or even a private citizen to a public official are per se outside the protection of the First Amendment.

III

Since the filing of the petition, the opinion in *Pilkington* v. *Bevilacqua*, 439 F. Supp. 465 (D.R.I. 1977), has come to our attention. There the court sets forth reasons why the First Amendment applies to in-channel communi-

cations by a public employee. *Id.* at 474-77. The court concludes:

> "Certainly . . . [the public employee's] criticisms do not lose the protection of the First Amendment by reason of their being prudently directed to his co-employees and superiors inside the . . . [public agency] instead of to the public at large. Absent special considerations not present here, the truth-seeking values protected by the First Amendment apply to criticism of government inside its halls as well as in the letters to the editor column. Indeed, the *Pickering* Court suggested that there may be situations where an employee has a duty to bring his criticism to the attention of his superiors before making it available to the public at large. *Id.* at 572 n.4, 88 S.Ct. 1731. While the Court need not decide whether or not Mr. Pilkington had such a duty, it seems apparent that he did not, by his prudence, forfeit the protection his criticism would have had had he first trumpeted it to the local newspaper." *Id.* at 474-75.

CONCLUSION

For the reasons stated here and in the petition, the writ should be granted.

Respectfully submitted,

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